

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

Retention by Broadcasters of
Program Recordings

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MB Docket No. 04-232

COMMENTS OF THE ARIZONA BROADCASTERS ASSOCIATION

The Arizona Broadcasters Association (hereinafter "the Association") submits these comments in response to the Notice of Proposed Rulemaking released July 7, 2004 in the above-captioned proceeding (the "NPRM"). In the NPRM the Commission proposes to require all broadcasters to record and retain the recordings of their programming for some set period of time ostensibly to increase the effectiveness of the Commission process for enforcing the statutory and regulatory restrictions on obscene, indecent and profane broadcast programming.¹ Specifically, the Commission tentatively proposes that all broadcasters record and retain all programming transmitted between the hours of 6:00 a.m. and 10:00 p.m. (hereinafter the "proposal"). While the NPRM seeks comments on numerous issues raised by the proposal it offers no details regarding implementation. The Association, whose members include approximately 138 commercial and non-commercial radio and television stations in the State of Arizona, strenuously opposes this proposal.²

¹ NPRM at para. 6: *see* 18 U.S.C. § 1464.

² The Association's mission includes working to preserve and strengthen local over-the-air broadcasting in the state. The ABA Mission Statement includes its directives to encourage and promote the customs and practices which will be for the best interests of the public and the radio and television broadcasting industry and to protect its members in every lawful and proper manner from injuries and unjust exactions.

The NPRM tentatively proposes to revise current Commission indecency-complaint rules and practices by eliminating the duty of a complainant to include sufficient information with the complaint regarding the alleged offending broadcast, such as a tape, transcript or significant excerpt. This requirement ensures that the Commission has "some sense of whether the material broadcast may have violated the law before we commence an inquiry," thereby conserving Commission resources.³ This minimal showing is akin to and no more burdensome than pleading requirements in civil actions, where complainants must make an initial showing to avoid dismissal.

Eliminating a complainant's duty to make an initial showing will unduly burden broadcasters by imposing new costs and duties yet achieve no noticeable impact on the effectiveness of the complaint process. Since the Commission began compiling data in 2000, only 193 complaints - or less than one percent of all complaints during that time period - have been denied or dismissed for lack of tape, transcript or significant excerpt.⁴ These numbers demonstrate that virtually all cases complainants are satisfying the initial filing requirements applicable to broadcast indecency complaints. In other words, there is no problem here that needs fixing.

The Commission's current rules and procedures are more than adequate to address the indecency issues before it. The Commission need not divert its attention and expend its limited resources pursuing a flawed proposal that raises complex issues, including those involving constitutionally permissible restrictions on free speech, the effect on broadcasters as well as third parties, and the details of implementation. The Commission

³ NPRM at para. 8.

⁴ See Letter from Chairman Michael K. Powell to the Hon. John D. Dingell, March 2, 2004, Ex. 1.

should focus its efforts on its promptly processing legitimate complaints from the public instead of trying to cast its net over the thousands of broadcasters that consistently comply with Commission's rules and uphold their community standards.

Discussion

On February 20, 2004, the Honorable John D. Dingell, Ranking Member of the Committee on Energy and Commerce, submitted a series of questions to Chairman Powell as a follow-up to his February 10, 2004, testimony before the House Subcommittee on Telecommunications and the Internet regarding the Broadcast Decency Enforcement Act of 2004. Question 5 of Part I, the section pertaining to the FCC's process for reviewing and disposing of listener/viewer complaints, requested data on denials and dismissals of indecency complaints, and is particularly relevant to this proceeding.⁵ The Commission's response to Rep. Dingell affirms that very few indecency complaints are denied or dismissed for lack of a tape, transcript, or significant excerpt. Specifically, according to Chairman Powell's March 2, 2004 response offered the following statistics:

- Of the 14,379 total indecency complaints received between 2000 and 2002, only 169 - or 1.18 percent - were denied or dismissed for lack of a tape, transcript or significant excerpt.

⁵ Question 5 states: "In its 2001 Policy Statement on Industry Guidelines on the Commission's Case Law Interpreting 18 U.S.C. Sec. 1464 and Enforcement Policies Regarding Broadcast Indecency, the Commission states that in order for a complaint to be considered, 'our practice is that it must generally include . . . a full or partial tape or transcript or significant excerpt. .' If the complaint does not include such information, the Commission states that the complaint 'is usually dismissed.' During each year, how many complaints has the Commission dismissed or denied for lack of a tape, transcript, or significant excerpt?"

- Of the 771,235 total indecency complaints received between 2003 and 2004, only 24 – less than one percent – were denied or dismissed for lack of a tape, transcript or significant excerpt.⁶

These denial/dismissal rates cannot be reconciled with the characterization by vocal "watchdog" groups that the complainant's duty to make an initial showing routinely presents an insurmountable obstacle and is so onerous that it must be eliminated.

The NPRM implies that the proposal is necessary because the Commission may be unable to obtain an adequate record with which to evaluate a complaint unless it institutes some sort of mandatory programming retention rule. If this is in fact a basis for the proposal, it is severely flawed. Substantial regulatory and market incentives already encourage industry cooperation in the complaint process and ensure that the Commission obtains all information necessary to make determinations regarding alleged indecency, obscenity or profanity.

When a licensee can neither confirm nor deny a complainant's allegations of indecent broadcast, the Commission then may find that the broadcast did in fact occur. *See Clear Channel Broadcasting Licensees, Inc.*, 19 FCC Rcd 1768 (2004). This decision establishes a compelling regulatory incentive for broadcasters to cooperate with the Commission and assist in providing programming records to ensure a complete record. Inexplicably, the NPRM fails to explain why mandatory recording and retention

⁶ The response reveals that the Commission received an extraordinary number of duplicative complaints regarding a handful of shows during the period 2003-2004. Even when these duplicative complaints are excluded, the denial/dismissal rate is remarkably low. For example, of the 771,235 complaints received during 2003-2004, it appears 770,665 were duplicative. Of the remaining 570 presumably non-duplicative complaints, only 24, or only approximately four percent, were dismissed for lack of a tape, transcript or significant excerpt.

is required when broadcasters have been clearly placed on notice that their inability or refusal to cooperate in the development of the record may result in a finding of violation.

The NPRM also fails to account for the role of marketplace incentives, which the Commission has long recognized and encouraged. The broadcast of objectionable content is inconsistent with the broadcaster's own economic interests – advertisers and listeners and viewers – dictate programming at the local level. Broadcasters look to their communities, not the Commission, for guidance as to what is appropriate to air in their community. In fact, they have a statutory obligation to do so. Thus, most stations have never had an indecency complaint filed against them at the Commission. A review of the FCC Enforcement Bureau's Indecency webpage, shows only *one* Notice of Apparent Liability issued against a station licensed to Arizona,⁷ of the 254 stations licensed to communities in Arizona, since November 8, 1999.⁸ Imposing mandatory recording and retention requirements thwarts the public interest by imposing unnecessary costs and obligations on broadcasters that detract from its operations and community-oriented efforts.⁹

Hundreds of broadcasters have already filed comments with the Commission opposing the proposal, with many of them identifying the significant costs associated with mandatory recording and retention of programming. Costs associated with the proposal will not be limited merely to items such as equipment, labor and storage,

⁷ See <http://www.fcc.gov/eb/broadcast/NAL.html>. See *Regent Licensee of Flagstaff, Inc.* Case No. 99090142, released September 7, 2000.

⁸ The number of stations reflects the AM, FM, TV and Class A TV stations appearing as licensed or licensed and silent in Arizona by CDBS.

⁹ Moreover, these additional costs will create regulatory disparities between broadcasters and subscription-service providers if the subscription-service providers are exempted from the mandatory requirements.

however.¹⁰ Eliminating complainants' duty to satisfy a minimum initial showing will almost certainly exacerbate the recent trend in which email complainants inundate the Commission. Presumably as a result of electronic filing, indecency complaints jumped almost twenty-fold from 2002 to 2003: from 13,922 to 240,350 in 2003. The 2003 total more than doubled in January 2004 alone, when the Commission received 530,838 complaints regarding a single program - the Super Bowl XXXVIII halftime show.¹¹

It is undisputed that the vast majority of the indecency complaints received by the Commission pertain to a handful of programs. Remarkably, over 99 percent of the complaints received during the 2002-2004 period - 784,199 of 785,157 complaints - involved only 10 specific programs, presumably involving only network and syndicated programs.¹² Modern recording devices guarantee that tapes, transcripts or significant excerpts of these few programs are readily-available, obviating any need to be recorded and retained by individual stations across the country, in all markets.

Comments to date affirm that the overwhelming majority of broadcasters air programming consistent with the Commission's Rules and their local community standards. Dismissal/denial rates of close to zero percent for the last several years demonstrate that regulatory and market incentives are adequate and that the Commission *is* obtaining from broadcasters the material it deems necessary to evaluate complainants' allegations. The proposal outlined in the NPRM, if adopted, would needlessly burden broadcasters and divert resources from the real task before the Commission: promptly addressing and resolving meritorious complaints.

¹⁰ Alternative recording and storage options, such as the third-party recording service described by VoiceLog LLC, may be costlier over time than the broadcaster's purchase of equipment.

¹¹ Powell letter, Exhibit 1.

Conclusion

There is no evidence that the recording and retention proposal will advance the stated objective of increasing the Commission's effectiveness in enforcing restrictions on obscene, indecent and profane broadcast programming. The record demonstrates that the proposal will impose regulatory burdens on broadcasters and diminish their ability to serve their communities, with no countervailing benefit. The Commission, therefore, should reject the proposal and retain the *status quo*. It should continue to require that complainants make some minimum initial showing, generally by tape, transcript or significant excerpt. If additional information is required, the Commission should continue to rely on the regulatory and economic incentives currently in place to obtain that information from broadcasters.

Respectfully submitted,

ARIZONA BROADCASTERS ASSOCIATION



By: Dawn M. Sciarrino
Susan M. Hafeli
Its Attorneys

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Sciarrino & Associates, PLLC
5425 Tree Line Dr.
Centreville, VA 20120
(703)830-1679
(703)991-7120 (fax)
info@sciarrinolaw.com
www.sciarrinolaw.com

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